(3)

No. 04-1[illegible] MAR 2 - 2005

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IN THE

United States Supreme Court

CLARENCE HARLEY,

Petitioner,

v.

ROBERT ADLER, Individually and as Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER,

Respondents.

On Petition For Writ of Certiorari
To The New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

CLARENCE HARLEY
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QUESTION(S) PRESENTED

Do New York Courts violate the V, VII and XIV Amendments by failing to address statutory law and rule designed to protect the public interest raised in a complaint?

Did the New York Courts violate the V, VII and XIV Amendments by denying the petitioner the right to bring his allegation before a jury for redress for damages to property and/or property rights?

Does the 2nd Judicial Department violate the V, VII and XIV Amendments by denying and/or discouraging state statute designed to protect the public interest by its current policy of nonfeasance?

Does a Court violate a party's due process rights by intentionally ignoring probative evidence submitted by a party?

Does an attorney have immunity from prosecution for submitting improper statements and misrepresentation tbefore a court or a committee on ethical standings?

Whether pertinent parties of the court, having knowledge of wrong doings in section 1985, fall within the proscription of 42 USCA § 1986?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court reviewing the merits appears at Appendix B to the petition. The order of the New York Appellate Court appears at Appendix C is unreported, but is available under 2004 NY Slip Op 03771.

JURISDICTION

The date on which the highest state court decided the case was September 21, 2004. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on date December 2, 2004, and a copy of the order denying a rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

V Constitutional Amendment provides in relevant part "No person shall be . . .deprived of life, liberty, or property, without due process of law . . ." *USCA Const. Amend V*

VII Constitutional Amendment provides in relevant part ". . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *USCA Const. Amend VII*

XIV Constitutional Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U.S.C.A Const. Amend XIV*

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Miscellaneous

Effect of Nonsuit, Dismissal, or Discontinuance of Action on Previous Orders, 11 A.L.R.2d 1407 § 3, § 6

STATEMENT OF THE CASE

A. Current Supreme Court Action

This case was brought before the Supreme Court of New York State, Kings County in December 2000 by the petitioner pro se. The petitioner raised triable issues of fact as to whether the respondents were guilty of fraudulent misrepresentation in inducing the petitioner with the impression that a petition application filed on his behalf by his attorney had been with drawn and/or representing before the Surrogate that an agreement had been entered into to with 'unspecified' parties when the respondents had knowledge that the statements were untrue. Moreover, the petitioner raised the triable issue that the respondents and/or the participating attorneys engaged in a pattern of conduct that damaged his application for fees. The petitioner alleged that the respondent conduct either before the Surrogate and/or before the Grievance Committee triggered the provisions of Judiciary Law § 487.

The statement(s) and/or conduct by the respondent was/ were made under color of the law invoking the statutory provisions of 42 USCA 1983 and 1985. The petitioner raised the federal question invoking 42 USCA 1983, 1985 in the complaint, at the Appellate level and with the Court of Appeals as is reflected at App. 18a-24a, 27a-28a.

The relevant sections read,

> "Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. **42 USCA § 1983**
>
> ". . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person . . ." **42 USCA § 1985 (2)**

> ". . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." **42 USCA § 1985 (3)**

The petitioner is not seeking to relitigate the issue of fees or reimbursements, but prosecuting the fraud, collusion and deceit engaged in by the participating attorneys damaging the petitioner's standing in petition applications before the Surrogate pursuant to CPLR § 213(8) and Judiciary Law § 487 and the relevant federal statutes identified above.

The dismissal and denial of the appeal by the New York State Courts constitute a violation of the V, VII and XIV Amendments of the Constitution of the United States. The petitioner raised the Constitutional question in the complaint, at the Appellate level and with the Court of Appeal as is reflected at App. 24a-28a.

The record reflects that the appellate division clearly passed on these issues in its decision at App. 5a.

B. Prior Surrogate Action

In November 1994 the petitioner, through his attorney, filed an application pursuant to SCPA § 712 and/or SCPA § 711 seeking to revocation and/or suspension of letters of administration issued to Samuel Plotkin, Public Adminis-

trator, in the estate of Russell Smith. The application alleged inter alia that the public administrator, through his attorneys (the respondents), was engaged in conduct adverse to the interest of the estate by, namely but not limited to, holding personal creditors of one Russell S. Smith as priority creditors of the estate in violation of EPTL § 11-4.7(a). Russell S. Smith was decreed ineligible at the onset of his appointment as co-fiduciary of the referenced estate (C); notwithstanding, said party improperly masqueraded as the decedent on several occasions encumbering estate assets in Kings county for his own gain. Lastly, Samuel Plotkin failed to remove the respondents after being informed that the respondent Robert Adler and his law firm's appearance constituted a conflict of interest which the record affirmatively showed that respondent Robert Adler represented Russell S. Smith in the same referenced estate in a prior action before the Surrogate's Court in 1989.

The petitioner raised a SCPA § 711 and/or § 712 petition application seeking the suspension and/or revocation of letters of administration in the Estate of Russell Smith issued to the Samuel Plotkin, Public Administrator, Kings County.

The matter was compromised by the participating attorneys. The Surrogate issued an order discontinuing the proceeding on a purported stipulation appearing at App. 40a.

The application to revoke the public administrator was not decided on the merits. The order was issued without prejudice and; accordingly, does not get res judicata treatment.[1]

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[1] CPLR § 3217(c) and 11 ALR2d 1407 § 3, § 6

Finally, there were no issues raised regarding the respondents participating in collusion with his attorney or fraud, deceit or on the pending applications with court. There were no issues raised with court regarding improper and/or false declarations made by parties, acting in concert with the respondents to damage petitioner's standing in his application to validate his fees. Nor were there any issues before or entertained by the Surrogate about the respondents' misrepresentations before the grievance committee.

Consequently, all allegations and claims in the instant complaint are preserved.

C. Disposition in Supreme Court Action

The petitioner commenced this action before the Supreme Court pro se in 2000. Thereafter, the petitioner retained counsel but the attorney had to be removed for cause, *inter alia*, failing to provide copies of pleadings prepared and failing to competently and appropriately address discovery disclosure on behalf of the petitioner. In June of 2002 the petitioner retained new counsel and was directed to file the Note of Issue by October 31, 2002. The petitioner issued supplementary request for production of documents in September of 2002 and thereafter, filed the Note of Issue and the appropriate fee for jury trial on October 31, 2002.

The respondents immediately, thereafter, moved for summary judgment on or about November 1, 2002. Thereafter, on or about November 15, 2002 the respondents moved the court to vacate the note of issue. Although respondents moved for summary judgment their affidavit supporting the motion to vacate the note of issue claimed

that the case was not ready for trial since ". . . plaintiff has not appeared for deposition pursuant to this Court's various orders enumerated above, all necessary discovery proceedings have not been completed.

Respondents made these claim all after refusing to comply with the petitioners Supplemental Request for Documents appearing at App. 78a-85a and after moving the court for summary judgment motion.

Generally, in New York courts all motion practice stops once summary judgment motion is filed. However, in this case the latter motion to vacate the note of issue was moved on by Justice Rivera while the motion for summary judgment was before Justice Ruchelsman's, who had taken over the case load of Justice Rivera, heard on or about December 5, 2003 and adjourned to January 10, 2004. However, the record reflects that Justice Rivera heard and moved on the motion to vacate the note of issue on or about December 19, 2003.

Why would a party be subjected to appearing before two Justices simultaneously in one action? The motion permitted the respondents to engage in abusive disclosure tactics denied the petitioner the right to bring his allegations before a jury for redress. The conduct violated the V, VII and XIV Amendments to the Constitution.

Moreover, the record reflects the motion court deliberately ignored probative evidence before the court supporting the petitioner's fact pattern of fraud and collusion and/or deceit between the participating attorneys at App. 18a-203.

The court ignored evidence of petitioner's attorney compromising and/or settling petitioner's claim without con-

sent at App. 45a vis-à-vis his affirmative instructions at App. 35a-36a. The court ignored the petitioners own attorney violating CPLR 321(b) and her confession in her December 5, 1997 letter at App. 38a-39a claiming that she did not submit any papers to the court.

An attorney may not settle or compromise his client's action in the absence of consent (Silver v Parkdale Bake Shop, Inc. 8 AD2d 607, 184 NYS2d 714).

The court ignored the petitioner, having standing, fined $10,000 by the Surrogate (reflective in the Surrogate Transcript) without cause.

Justice Ruchelsman's determination that the petitioner entered into an open court agreement with the respondent at App. 10a is improper and incredibly did not even represent an argument advanced by respondents or affirmatively reflected within the record. Moreover, material determination in the decision lacked fidelity to the transcript and/or record before the court. The petitioner raised all of the above issues at the Appellate level and with the Court of Appeals as is reflected at App. 18a-26a.

The motion court's conclusory statement that petitioner entered into an open court agreement with respondent Adler, at minimum, raised another triable issue of fact as to whether or not the petitioner entered into an open court agreement with the petitioner. The fact is not affirmatively shown in the record.

Moreover, open court stipulations or agreements exists only where there is no subscribed writing or other record to evidence the agreement.[2] The motion court ignored the evidence implicating the participating attorneys improperly moving without the petitioners consent at App. 45a-48a.

"Where triable issues of fact are raised by conflicting affidavits, the court errs in making factual determinations to support its action in either dismissing the action or granting summary judgment."[3] It is improper for justice Ruchelsman to embellish the record with facts that are not within his personal knowledge.

The dismissal denied the petitioner the opportunity to raise his issues before a jury to determine whether or/not the alleged conduct among the participating attorneys constituted fraud collusion and/or deceit. Accordingly, the courts dismissal violated the V, VII and XIV Amendments to the Constitution.

The grant of summary judgment denied the petitioner the opportunity to examine the participating attorneys before a jury wherein examination of one of the parties would likely implicate the other; notwithstanding existing, probative evidence before the court. The grant of summary judgment violated the V, VII and XIV Amendments to the Constitution. The petitioner raised those issues within the complaint, before the appellate division and with the Court of Appeals in the motion for reargument (omitted here).

REASONS FOR GRANTING THE WRIT

A. Decision Conflicts with Other Appellate Decisions and United States Court of Appeal Decisions

The decision before the Court not only conflicts with decisions of other appellate divisions and United States

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[2] (6 Weinstein-Korn-Miller, NY Civ Prac ¶2104.03

[3] (6B Carmody-Wait 2d 39:117)

court of appeals but also conflicts with the very citations used to support the decision.

The decisions below determined the petitioner's complaint was barred by the doctrine of res judicata when the three (3) requisite elements of res judicata were not present. In another aspect the lower courts failed to apply the full and fair opportunity test before invoking the doctrine of collateral estoppel.

A dismissal of an earlier action on some lesser ground ordinarily does not get res judicata treatment.[4] Examples of this would include dismissal for lack of prosecution, or voluntary discontinuance. The discontinuance in the prior action regarding the application to revoke the letters of administration to the public administrator does not get res judicata treatment. The petitioner advanced that argument on both the Supreme Court and Appellate levels on the ground that the merits of the issues were never judicially decided.

The decision before the Court conflicts with the Supreme Court of Oneida County in January 2004 in the case Kulpa v Jackson (773 N.Y.S.2d 235) which applied the CPLR § 3217(c) ruling in one aspect of that case. The Oneida County held that § 3217(c) governs the res judicata effect of a discontinuance. "The general rule is that unless the discontinuance itself states otherwise, whether the notice, stipulation, or order, it is not res judicata so as to bar a new action. The court can specify, for example, that no later action may be brought by on the claim, result that invokes the res judicata doctrine. So does the shorthand phrase

[4] (Siegel, NY Prac § 442 at 715 and § 446 at 720 [3d ed])

'with prejudice'. 'Whatever phrase is used should make clear the court's intent.'

Therefore, the order issued by the Surrogate, submitted on the record at App. 40a, does not get res judicata treatment. The order is devoid of any such limiting language and; accordingly, the petitioner is not barred by the doctrine of res judicata in the instant action.

Kaufman v Eli Lilly and Co. 492 N.Y.S.2d 584 (Ct. App. 1985), a similar case involving a stipulation and/or discontinuance, conflicts with the instant decision. There the Court of Appeals of New York determined, in part ". . . if issue has not been litigated, there is no identity of issues between the present action and the prior determination; an issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place matter in issue by proper pleading or even because of a stipulation."

Accordingly, the "could have should have been litigated" aspect of the appellate division's determination is inapposite (App. 6a). That branch of the complaint relating to conduct triggering the provisions of Judiciary Law § 487 was never entertained by the lower courts as is also reflected at App. 6a.

The decision conflicts with the California Appellate Court decision in Garcia v Borelli App 180 Cal.Rptr. 768. There the court identified the three (3) elements required for the doctrine of res judicata. It also determined that just because the action involved the contents of the will as drafted, it did not seek further recovery from the estate of the Testator or from Wife. It did not seek to modify in any way the settlement or judgment entered in the probate

court proceedings. Moreover, the issues of the respondent's negligence and resulting damages were not in issue in the probate court proceedings and could not have been considered by that court.

Likewise the petitioner advanced similar arguments before Supreme Court, the Appellate Court and with the New York Court of Appeals at App. 16a-17a. The case before the Court involved the content of the Surrogate proceeding but does not seek further recovery from the estate. It does not seek to modify any way the judgment entered on the claim to validate the application for fees. The petitioner is seeking damages for the alleged misconduct and improprieties engaged by the respondents during the pendancy of two applications before the Surrogate. The issue of the respondents' misconduct and resulting damages were not in issue during the Surrogate proceeding and could not have been considered by that court.

Nor could the misstatements and improper statements made to the grievance committee could have been before or entertained by the Surrogate in 1995, since the acts were committed more than two years after the petitioner commenced the proceeding before the Surrogate's Court. (App. 50a-60a and 42a-44a)

An attorney should not be allowed to sit behind an order and continue to damage a party's rights and privileges. Each improper act constitutes a renewal of a cause of action. Accordingly, issues of accrual were overlooked.

In another aspect of res judicata—collateral estoppel—the decision conflicts with Durkin v Shea & Gould. The case from the United States Court of Appeals, Ninth Circuit indicated the court should recognize circumstances such as reason to doubt the quality, extensiveness, or fair-

ness of procedures followed in prior litigation and which may warrant an exception to the normal rules of preclusion. The parties must have had a full and fair opportunity to litigate and collateral estoppel does not apply when the party whom the earlier decision is asserted did not have a full and fair opportunity to litigate the claim or issue in the earlier case (Durkin v Shea & Gould 92 F.3d 1510). Likewise, the petitioner made similar arguments at the appellate level and before the court of appeals at App. 26a-28a.

The decision conflicts with California Appeals Court decisions. California Court of Appeals held that an attorney is not absolved of misconduct where the attorney's misconduct and/or negligence caused a court to make an erroneous adjudication of an issue (Ruffalo v Patterson 285 Cal.Rptr 647). " To hold otherwise would be to rule that where an attorney's negligence [and/or misconduct] has caused the court to make an erroneous adjudication of an issue, the fact that the court has made the adjudication absolves the attorney of all accountability and responsibility for negligence [and/or misconduct]. That cannot be and is not the rule. The doctrine of collateral estoppel does not apply.

The United States Court of Appeals, Ninth Circuit, likewise found that the issue of whether a settlement was fair and adequate is not the same issue as whether the settlement was reasonable in light of the alleged malpractice by the participating attorneys. Moreover, the fact that a party received a settlement that was fair and equitable does not necessarily mean that the party' s attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent (Durkin v Shea & Gould 92 F.3 1510). Likewise the

petitioner advanced similar arguments before the appellate division and with Court of Appeals at App. 28a-30a.

More dramatically, however, is the fact that the very citations used to support the decision were merely perfunctory ministerial indications to give the decision facial credibility. The appellate decision failed to apply any of the benchmarks—the decision is devoid of any analysis.

In both Coliseum Towers Assoc. v County of Nassau (217 AD2d 387) or Matter of Hodes v Axelrod (70 NY2d 36) it was found that the identity of issue between prior actions were not the same. An analysis was made in those cites regarding issues raised in prior actions and the current action on appeal.

The petitioner made a strong effort to advance similar arguments to the Appellate Division and with the Court of Appeals at App. 16a-17a that the SCPA 711/712, *inter alia*, violations of EPTL 11-4.7(a) regarding payments to non-creditors, and the conflict of interest engaged in by the respondents in the prior action before the Surrogate were not the same issues raised before the Supreme Court pursuant to CPLR § 213(8) and Judiciary Law § 487, *inter alia*, misrepresentations made to the petitioner and/or the Surrogate about an agreement, wholesale misrepresentations made to grievance committee regarding their role in the administration of the estate of Russell Smith.

Likewise, the court never made an attempt to reconcile their citing of Gramatan Home Investors Corp v Lopez 46 NY2d 481, 485 and CRK Constr of Suffolk v Brown & Associates 260 AD2d 530). Both those cases demonstrated that before collateral estoppel is invoked a determination of whether the party whom the doctrine is invoked had a

full and fair opportunity to litigate the prior controversy. New York Courts have adopted a full and fair opportunity test. The decision before the Court failed to apply that standard "test". The decisions are devoid any reference or analysis of the various factors which enter into the determination of whether a party had a full and fair opportunity, despite the petitioner advancing the very argument before the appellate level as well as the court of appeals that the lower court failed to apply the test when he claimed that he did not have a full and fair opportunity because of the fraud, collusion and deceit engaged in by the participating attorneys.

Not only did the petitioner produced new evidence that refuted declarations made about the value of the estate, one of the elements of the "test", the petitioner claimed his standing in the that claim was damaged as a result of the fraud, deceit and collusion engaged in by the participating attorneys. Those issues were not before the Surrogate at the time of the petition applications. (App. 26a)

The failure the New York Courts to accord the petitioner appropriate consideration entitled to, relevant under the circumstances, constitute a violation of V, VII and IV Amendments of the Constitution. The appellate raised the constitutional question before the appellate level and with the Court of Appeals at App. 26a-30a.

B. 2nd Judicial Department Fosters Predator Practices

In this case before the Court, the 2nd Judicial Department policies foster predator attorney practices by failing to address the statutory rule designed to protect the public

from unscrupulous attorneys' and/or attorney dealings. In the case before the Court the failure of the Grievance Committee to address the respondents' conduct when raised by the petitioner in 1997 allowed property held in the referenced estate to be improperly disposed of. On or about August 15, 2000 the Public Administrator's office was a party to the sale of the Quogue property which was owned by the decedent and part of the assets turned over to the Public Administrator by the co-fiduciaries. The sale was for $121,000 as is reflected at App. 61a-70a.

Be mindful, however, respondent Adler in his position statement dated September 4, 1997 indicated to the Grievance Committee property located in Quogue was ". . . passed to the heirs 'in kind,' and therefore was not part of the decedent's probate estate. No fees or commissions were taken by the Public Administrator or his counsel with regard to that property, despite the fact that a Deed and other documents transferring title were prepared for recording for the heirs." App. 56a-57a.

That transaction was illegal.

The lid is off the trash can. The circumstances are as much of an indictment of nonfeasance against the 2nd Judicial Department as it is an indictment of malfeasances on the parties who were a part of the sale.

The case before the Court is in extreme need of consideration because of others who are similarly situated who either own property within the counties of the 2nd Judicial Department or who have families with property rights or interests within those counties and/or parties similar to the petitioner, who may represent parties through business

relations. Judiciary Law § 487 is being ignored despite parties making an appropriate pleadings in complaints.

The statute states in its relevant parts:

"An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain, or willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed by therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." *Judiciary Law § 487*

The Appellate court failed to see any flags of impropriety either by the Grievance Committee dropping the ball on the ethical considerations regarding the conflict or other egregious misrepresentations by the respondent App. 60a. In 2002 the Appellate division sought to defend the Surrogate errs made in 1997, claiming that the Surrogate was in the best position to make a determination found no conflict with the respondents' appointment at App. 75a.

The determination conflicts with the court's own ruling in Seeley v Seeley. Doubt as to the existence of a conflict of interest must be resolved in favor of disqualification so

as to avoid even the appearance of impropriety (Seeley v Seeley 129 A.D.2d 625, 514 N.Y.S.2d 110).

The gravest misgivings by the Appellate court is its communications to the petitioner dated October 18, 2002 at App. 71a-73a, where it is claimed the court was without authority "... for overruling or even reviewing the administrative decisions of bodies established under law, such as the Grievance Committees, or acting as an appellate court of one over decisions from trial courts, such as the Surrogate's Court." App. 72a.

So whether the Appellate court saw merit to petitioner's issues before and/or after gaining jurisdiction of the instant case, the petitioner was not likely to get a fair and/or impartial decision from the court. The record reflects here that the court affirmatively passed on the issues triggering the provisions of Judiciary Law § 487 at App. 6a. The petitioners claim, therefore, that the 2nd Judicial Department fosters predatory practices is, therefore, affirmed. The likelihood of circumstances repeating themselves are eminent unless stronger safeguards are instituted.

A final question before the Court relevant to the gross nonfeasance perfected by 2nd Judicial Department is whether the pertinent parties having knowledge of the circumstances alleged by the petitioner are in violation of the federal statute 42 USCA § 1986.

The statute reads in its relevant parts:

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects

> or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented . . ." **42 USCA § 1986**

This Court has consistently upheld the basic due process issues of jurisdiction, notice and a full and fair opportunity to be heard before an unbiased and impartial court of law. This case warrants certiorari since the improper grant of summary judgment violated the V, VII and XIV Amendments to the Constitution. The petitioner raised the constitutional questions within the complaint, before the Appellate division and with the Court of Appeals as is reflected throughout Appendix E.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Clarence Harley

Clarence Harley

Dated: New York, New York
February 28, 2005